Han Euu Tiam v Phang Kui Fatt & Ors

HIGH COURT (TEMERLOH) — CIVIL SUIT NO 22-38 OF 1999
MOHD HISHAMUDIN J
10 AUGUST 1999

Civil Procedure *— Affidavits — Defective affidavit without jurat — Non compliance with prescribed form — No formal application to use defective affidavits made — Whether defective affidavits should be accepted — Rules of the High Court 1980 O 41 r 1(7), (8) & r 4*

For the purpose of an application for an interlocutory injunction, the plaintiff had filed four supporting affidavits in the Malay language ('the affidavits'). Counsel for the defendants raised a preliminary objection in that the affidavits were invalid on the ground that they do not have a jurat in the form as prescribed by O 41 r 1(7) and (8) of the Rules of the High Court 1980. Counsel for the applicant conceded that the jurat accompanying the affidavits was not in the prescribed forms but argued that the court should accept it, and in the alternative, if the court is of the view that the jurat is defective, he had orally applied for the leave of this court to use the affidavit, citing O 41 r 4.

Held, upholding the preliminary objection and dismissing the application with costs:

(1) There was non compliance with O 41 r 1(7) and (8). In view of this substantial deviation from the prescribed format and bearing in mind that O 41 r 1(7) and (8) use the word 'must', the court is unable to accept the jurat, as used by the plaintiff, as a valid jurat. Without a valid jurat, the affidavits were defective and cannot be accepted. Therefore, the interlocutory application was thus without a supporting affidavit and must fail (see p 688B–D).

(2) The last minute oral application to use the defective affidavits was unacceptable. If counsel was serious about invoking O 41 r 4, there should have been a proper formal application made at the earliest opportunity (see p 688E–F).

[Bahasa Malaysia summary

Bagi tujuan suatu permohonan untuk satu injunksi interlokutori, plaintif telah memfailkan empat afidavit sokongan di dalam bahasa Melayu ('afidavit-afidavit tersebut'). Peguam defendan-defendan telah membangkitkan bantahan permulaan bahawa afidavit-afidavit itu tidak sah atas alasan afidavit-afidavit itu tidak mempunyai jurat di dalam bentuk sebagaimana yang ditetapkan oleh A 41 k 1(7) dan (8) Kaedah-Kaedah Mahkamah Tinggi 1980. Peguam plaintif mengaku bahawa jurat yang dilampirkan bersama afidavit-afidavit itu bukan di dalam bentuk yang ditetapkan tetapi menghujahkan bahawa

mahkamah patut menerima afidavit-afidavit tersebut, dan secara alternatif, sekiranya mahkamah mendapati bahawa jurat itu adalah cacat, beliau telah memohon kebenaran mahkamah secara lisan untuk menggunakan afidavit-afidavit tersebut, dengan menggunakan A 41 k 4.

Diputuskan, membenarkan bantahan permulaan dan menolak permohonan itu dengan kos:

(1) Tiada pematuhan kepada A 41 k 1(7) dan (8). Memandangkan wujud pemesongan yang cukup besar daripada format yang ditetapkan dan mengambil kira bahawa A 41 k 1(7) dan (8) menggunakan perkataan 'mesti', mahkamah tidak dapat menerima jurat tersebut, sebagaimana yang digunakan oleh plaintif, sebagai satu jurat yang sah. Tanpa jurat yang sah, afidavit-afidavit tersebut cacat dan tidak boleh diterima. Oleh itu, permohonan interlokutori tersebut dengan demikian tiada afidavit sokongan dan mestilah gagal (lihat ms 688B–D).

(2) Permohonan lisan di saat terakhir untuk menggunakan afidavit-afidavit cacat tersebut tidak boleh diterima. Jika peguam serius untuk membangkitkan A 41 k 4, sepatutnya terdapat satu permohonan formal yang betul dibuat semasa wujud peluang yang terawal (lihat ms 688E–F).]

Notes

For a case on defective affidavit without jurat, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 254.

Legislation referred to

Rules of the High Court 1980 O 41 rr 1(7), (8), 4, O 29 r 1, Form 78

Joseph Sebastian (*Amran, Joseph, Chan & Co*) for the plaintiff.

Rozilan bin Abdul Rahman (*Suhaimi, Tan, Zamani & Rozilan*) for the defendants.

Cur Adv Vult

Mohd Hishamuddin J: In the present case, pursuant to the filing of the civil suit, the plaintiff has filed an interlocutory application under O 29 r 1 of the Rules of the High Court 1980 (the 'RHC') seeking an interlocutory injunction to restrain the defendants from using certain machinery and equipment located on a specified piece of land. The plaintiff alleges that the machinery and equipment belong to him and that he has not given any consent to the defendants to use them.

For the purpose of this interlocutory application, the plaintiff has filed four affidavits, namely encls 3, 6, 18 and 19. All the four affidavits are in the Malay language.

At the commencement of the hearing of this interlocutory application, the learned counsel for the defendants, En Rozilan bin Abdul Rahman,

raises a preliminary objection. He submits that all the four supporting affidavits are invalid on the ground that they do not have a jurat in the form as prescribed by O 41 r 1(7) and (8) of the RHC. As the affidavits are invalid, therefore (he submits), the interlocutory application is without any supporting affidavit. And, as it is without any supporting affidavit, it follows it should be dismissed with costs.

Encik Rozilan informs this court that prior notice of the preliminary objection has been given to the counsel for the plaintiff on 28 July 1999.

Order 41 r 1 (7) and (8) reads:

(7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

(8) A jurat *must* be in one of the forms in Form 78. (Emphasis added.)

Do note the word 'must' in sub-r (7) and (8).

Form 78 provides:

No 78

FORMS OF JURAT (O 41 r 1)

(*Title as in action*)

(a) To an affidavit by one deponent ..... Sworn (or affirmed) on the ..... day of ....., 19..... at (Through the interpretation of .....).

Before me

.....

Commissioner for Oaths

(b) To an affidavit by two or more deponents ..... Sworn (or affirmed) by the deponents ..... and ..... (or by both (or all) of the abovenamed deponents) on the ..... day of ....., 19 ..... at (Through the interpretation of .....).

Before me

.....

Commissioner for Oaths

(c) To an affidavit by an illiterate or blind person ..... Sworn (or affirmed) on the ..... day of ..... 19....., at .....

I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit 'and explained the nature and effect of the exhibits therein referred to') to the said deponent who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of .....).

Before me

.....

Commissioner for Oaths

(d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ..... day of ....., 19..... at ..... through the interpretation of ..... (if the interpreter is not a Court Interpreter add the following: 'the said ..... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ..... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said .....').

Before me

.....

Commissioner for Oaths

Encik Rozilan submits that the jurat should be in one of the above forms, depending on the circumstances of the deponent (ie whether he understands the language used; or whether he is blind or illiterate). He submits that if the deponent is conversant in the Malay language and is not illiterate (or blind) then the jurat should be in Form (a), since the affidavits are in the Malay language.

What is a 'jurat'? It is not defined either in the RHC or in the Courts of Judicature Act 1964. Nor is the term defined in the Interpretation Acts 1948 and 1967. In *Jowitt's Dictionary of English Law* (1977 Ed), 'jurat' is defined as:

> Jurat, the statement at the foot of an affidavit of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as the affidavit of an illiterate or blind person as read in the presence of an officer to such person and that he seemed perfectly to understand it (RSC O 41 rr 1, 3).

In *Malaysian Court Practice* (Malayan Law Journal Sdn Bhd, 1997), High Court Vol 1 at p 2515, the meaning of 'jurat' is explained as follows:

> [41.1.13] Jurat
>
> A jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the clause written at the foot of the affidavit, stating when, where, and before whom such affidavit was sworn. A jurat must be in one of the forms in Form 78. Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

In the present case, the jurat in the affidavits is in the following form (taking encl 3 as an example):

DIIKRARKAN oleh)
HAN FU TIAM) tt
di TEMERLOH pada)
pukul 3.45 pm 20 Julai 1999)

Di hadapan saya
tt [name and cop]

.....

Pesuruhjaya Sumpah

A Encik Joseph Sebastian, the learned counsel for the applicant/plaintiff, concedes that the above jurat is not in any of the forms (ie (a)–(d)) prescribed by Form 78. He, however, argues that the above jurat is in order and urges this court to accept it.

He further submits, in the alternative, that if the court is of the view that
B the jurat is defective, he applies for the leave of this court to use the affidavit, citing O 41 r 4 which provides:

> Use of defective affidavit (O 41 r 4)
>
> An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

C In my judgment, there is merit in this preliminary objection. Clearly, there has not been compliance with O 41 r 1 (7) and (8) and Form 78. First, there is no title in the jurat used in all the four affidavits. A jurat is a certificate and it is clear from Form 78, by the presence of the words:

> *(Title as in action)*

D

appearing at the top part of the Form, that the title of the action must be stated at the top part of the certificate.

Second, neither the words — 'To an affidavit by one deponent ...' (see Form 78(a)) nor the words 'To an affidavit by a blind [illiterate] person ...' (see Form 78(c)), as the case may, are found in the jurat. These words are
E of significance because they not only certify the circumstances of the deponent in the making of the affidavit but they also indicate which particular form in Form 78 (eg whether Form 78(a) or Form 78(c)) is being used. If the deponent is neither blind nor illiterate but is not conversant in the Malay language (bearing in mind in the present case that the affidavit is
F in the Malay language), then Form 78(a) must be used. The affidavit must be interpreted to him in the language that he understands by a competent interpreter, and thereafter that part of the form which reads '(Through the interpretation of .....)' must be completed accordingly. The full name of the interpreter (together with his identity card number) and the language (for example, Mandarin or Cantonese) used by him to interpret
G the contents of the affidavit to the deponent must be recorded in the blank spaces provided in the brackets.

If, on the other hand, the deponent is conversant in the Malay language (and is not blind or illiterate), the form that must be used is still Form 78(a) and the aforesaid part of the form may still be completed. But it must now
H be completed by inserting in the blank spaces within the brackets the words '[interpretation not required]' in the following manner:

> (Through the interpretation of [interpretation not required])

This is one manner of dealing with the matter. Alternatively, and an easier way, would be for the Commissioner of Oath, when preparing the jurat
I certificate, to simply drop the whole words in the brackets (ie the words '(Through the interpretation of .....))' from the form. When the words in the brackets do not appear in the jurat certificate, the court will assume that the deponent is conversant in the Malay language.

However, although this is an easier way, yet, I think, the former method is preferable because the jurat would then expressly indicate that the Commissioner of Oath signing the jurat had addressed his mind to the question of the deponent's understanding of the language used in the affidavit. Thus, the question of the court making an assumption on the language proficiency of the deponent does not arise.

If the deponent is blind or illiterate, then Form 78(c) must be used.

To sum up, it is my finding that there has been a departure from the prescribed format and that such departure is not trivial in nature. There has been a substantial deviation. In view of this substantial deviation and bearing in mind that O 41 r 1(7) and (8) use the word 'must', I am unable to accept the jurat, as used by the plaintiff, as a valid jurat. To my mind, the extent of the defect is serious; it is as good as not having a jurat. In my judgment, strict compliance with the prescribed format is mandatory.

Without a jurat or without a *valid* jurat, the affidavits are defective and therefore cannot be accepted. The interlocutory application is thus without a supporting affidavit. It must fail.

Finally, I shall deal with En Sebastian's (counsel for the applicant) oral application for leave to use the defective affidavit pursuant to O 41 r 4, as I have mentioned earlier. Encik Rozilan objects to this oral application on the ground that the learned counsel for the plaintiff/applicant should not have made this application at the eleventh hour when notice of the preliminary objection had been given several days before the hearing. He submits that, in any case, there should have been a formal application filed well before today's hearing. I uphold this objection. This last minute oral application is yet another example of lip service application of the rules of procedure. I agree that if En Sebastian is serious about invoking r 4, there should have been a proper formal application made at the earliest opportunity. Of course, needless to say, whether he would have been successful in his application, had there been one made, is another matter.

This preliminary objection is, therefore, upheld. The application is, accordingly, dismissed with costs.

Preliminary objection upheld. Application dismissed with costs.

Reported by Loo Lai Mee